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NTSB Order No. EA-4435

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of March, 1996

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. ERROL H. VAN EATON, Respondent.	Docket SE-14075

OPINION AND ORDER

Respondent has appealed from the August 3 and August 24, 1995 decisions of Administrative Law Judge Patrick G. Geraghty. In those decisions,[1] the law judge granted the Administrator's motion for summary judgment, and denied respondent's request that the law judge then reconsider his grant of that motion. In

[1]Copies are attached. The law judge also issued an errata sheet to the August 3rd order.

granting the motion, the law judge affirmed an emergency order of the Administrator,[2] revoking respondent's airline transport pilot (ATP), flight instructor, mechanic, and ground instructor certificates on finding that respondent had violated 14 C.F.R. 61.59(a) and 61.151(b).[3] Although our reasons differ somewhat from the law judge, we deny the appeal and uphold the revocation.

The emergency order of revocation cites three circumstances in which respondent is alleged to have violated the cited rules. The following paragraphs summarize those circumstances:

> 1. On or about November 18, 1992, respondent (an FAA supervisory aviation safety inspector (ASI) at the Seattle Flight Standards District Office (FSDO)) and others gathered

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[2]Respondent has waived application of the statutory deadline applicable to emergency proceedings.

[3]§ 61.59(a) reads:

> § 61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records**.
>
> (a) No person may make or cause to be made:
>
> (1) Any fraudulent or intentionally false statement on any application for a certificate, rating, or duplicate thereof, issued under this part;
>
> (2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or any certificate or rating under this part[.]

§ 61.151(b) reads:

> § 61.151 **Eligibility requirements: General.**
>
> To be eligible for an airline transport pilot certificate, a person must -
> * * * * *
> (b) Be of good moral character[.]

in Washington State (at Wenatchee and Moses Lake) to be checked out in a Curtiss CW-46 aircraft.[4] Mr. Williamson signed FAA Form 8710-1, Airman Certificate and/or Rating Application, and in that form indicated that he had examined respondent orally and through an aircraft flight check and that he had "personally tested this applicant in accordance with pertinent procedures and standards." Motion for Summary Judgment, Attachment 1.[5] Based on this form, the FAA issued respondent the "permanent" CW-46 rating (the Form 8710-1 paperwork done by the examiner provided only a temporary certificate). In his motion, the Administrator offered evidence in the form of testimony from his prosecution of Mr. Haggland (Docket No. SE-14011) -- testimony that the law judge in that case had adopted. Mr. Gloyer, who stated that he had been the co-pilot of the flight (apparently confirmed by the aircraft logbook), had testified in Haggland that all required procedures were not done for each individual's check ride and that some procedures were not done at all. Attachment 3. The Administrator also claimed that respondent's deposition testimony included an admission that not all maneuvers had been performed. The Administrator argued that there existed a scheme between respondent and Mr. Williamson to issue ratings to each other and that respondent "caused" Mr. Williamson to make the false statements. Respondent initially maintained that he performed every maneuver requested by the examiner and that, if any maneuvers were not done, it was not readily apparent to him. He now maintains that he was not required to perform every maneuver because FAA Order 8710.3A allows examiners to omit maneuvers completed for earlier ratings.

2. On or about February 28, 1993, respondent and Messrs. Williamson, Pinsky, and Mackey met in Florida to be checked out in a Sikorsky SK-62 helicopter. Respondent acted as the examiner for Williamson, Pinsky, and Mackey, and prepared Forms 8710-1 for each. (Mr. Williamson then acted as the examiner for respondent's check ride.) Respondent failed to complete Williamson's, Pinsky's, and Mackey's forms, and about 1 week later asked a friend, also an FAA employee, to sign them instead. That friend, Richard Dominy, did so, and the three permanent ratings were issued. In Form 8710-1, as noted in Paragraph 1 above, Mr. Dominy certified in the portion of the form labeled "Inspector's Report" that he had

[4]In the group were Sean Gloyer (co-owner of the aircraft, who was not one of the check riders), Paul Haggland, Raymond Williamson, Harold Pinsky, and Robert Grimm.

[5]Hereafter, all references to attachments refer to those in the Motion for Summary Judgment unless otherwise indicated.

"personally tested each applicant in accordance with pertinent procedures and standards" and he dated his signatures February 28, 1993. Again, the Administrator argues that respondent "caused" Mr. Dominy to make the false statements. In support of his motion, the Administrator cited respondent's deposition testimony that he "anguished" over the three applications and then asked Mr. Dominy to sign in his stead. Respondent has answered that he and Mr. Dominy were unaware that the 8710-1 forms they used were old and did not contain language in the more current form that ostensibly allows issuance of new ratings without having personally tested an applicant.[6]

3. On or about March 18, 1993, respondent applied for a rating for an SK-64 aircraft, and that rating was certified by examiner A.M. Hunt. The basis of the application was respondent's prior military experience in the comparable CH-54A. This type of rating conversion can be done without any ground or flight tests. Mr. Hunt did the paperwork by mail. At his deposition, respondent testified that he did not believe he had given Mr. Hunt any documentation. The Administrator introduced evidence showing that respondent had not flown the military equivalent of that aircraft in the past 12 months, as the regulation required. And, the Administrator argued, respondent's professed understanding of the procedure and requirements to transfer military flying to civilian ratings was not believable.

Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976), citing Pence v. United States, 316 U.S. 332, 338 (1942), establishes that there are five elements to proving fraud: 1) a false representation; 2) in reference to a material fact; 3) made with knowledge of its falsity; 4) with the intent to deceive; and 5) with action taken in reliance on the representation. Proof of

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[6]The relevant language is as follows, with the new language (not contained in the form signed by Mr. Dominy) underlined:

INSPECTOR'S REPORT

I have personally tested this applicant in accordance with or have otherwise verified that this applicant complies with pertinent procedures, [and] standards, policies, and or necessary requirements with the result indicated below.

See Exhibit G to respondent's brief.

intentional falsification requires the first three elements.

We understand the Administrator's concern with schemes of rating trading. However, we are aware of nothing unlawful (and the FAA cites no rule or employment requirement or prohibition) in qualified examiners, whether FAA employees or not, giving each other check rides. Regardless of how unusual it may have been for Mr. Williamson to give a check ride outside his region, the Administrator's allegations as to the November 1992 incident must be supported by a showing that required maneuvers were not completed and that respondent knew as much.

The Administrator offers us such proof in the form of testimony from another proceeding, SE-14011, Administrator v. Haggland. Clearly, neither testimony in that case nor findings of fact made there would be res judicata for this case, as respondent is not bound by that decision. Further, to grant the motion for summary judgment, evidence must be viewed in the light most favorable to respondent and all reasonable inferences drawn in his favor.[7]

It is not enough to say that respondent should have known, and that respondent's explanation is not credible.[8] Moreover, and especially because respondent has not had his "day in court,"

[7]We, however, disagree with respondent's suggestion that he was entitled to greater leeway because he was representing himself. We have long held otherwise. Administrator v. Dudek, 4 NTSB 385 (1982), at footnote 5, and our standard correspondence with respondents acknowledging an appeal suggests an attorney be engaged.

[8]See Administrator v. Stewart, NTSB Order EA-4387 (1995).

and the law judge has not had the opportunity to observe his demeanor, we are unwilling here to conclude that a rational fact finder could not ultimately find a lack of a preponderance of the evidence regarding respondent's knowledge and intent. For example, respondent's inability to recall exact events and/or his expressed belief that Mr. Williamson had authority to modify the maneuvers and tests could be considered credible by a law judge on hearing and seeing him testify. Further, respondent's deposition testimony does not support the Administrator's claim that respondent admitted failing to make all required maneuvers. Respondent's testimony on this point is ambiguous, and we do not believe the standards for a motion for summary judgment should allow interpreting the cited colloquy as an admission that respondent knew the flight check was incomplete.

As to the February 1993 events (Paragraph 2), affirming the falsification charges based on the motion for summary judgment again requires a finding that the evidence in Haggland cannot support respondent's contentions. As discussed above, we think it preferable generally to conduct a hearing on such an issue so that issues of credibility can be fully explored. Thus, we decline to affirm that section 61.59(a) charge.[9] The lack of

[9]There is no doubt that Mr. Dominy did not personally examine the three individuals; and, at the least, he admits that his signing of the forms was "nonstandard" (Attachment 8 at 24); he withdrew an earlier admission that it was prohibited by the rules. As with the November incident, however, the Administrator's falsification allegation does not allege falsification on respondent's part, as he was not the one signing the forms. Instead, it alleges that respondent caused Mr. Dominy to falsify the forms.

sufficient evidence to support a grant of summary judgment on this count does not, however, require a remand to the law judge, for we find that the motion is sustainable on other aspects of the complaint.

The Paragraph 3 allegations are sufficient to grant the motion for summary judgment and sustain the order of revocation.[10] As first required by Hart, the rating application form falsely states respondent has flown at least 10 hours in a CH-54A in the past 12 months. Second, this fact clearly is material; it is critical to obtaining the SK-64 rating. Respondent stated in reply to the motion that this "is the only allegation that [in his view] has merit." He responded that this set of events was the result of a 23-year lack of understanding of FAR 61.73(d), which establishes the requirements for conversion, including a "military checkout as pilot in command" during the last 12 months. Respondent thus denied having the necessary knowledge that the statement was false.

In his appeal, respondent argues that precedent precludes a finding in favor of the Administrator because respondent was ignorant of the military-to-civilian conversion rules. We agree that a finding of intentional falsification requires actual knowledge of the falsity of a statement. See Stewart, supra.

[10] See Administrator v. Rea, NTSB Order EA-3467 (1991), citing Administrator v. Cassis, 4 NTSB 555 (1982), reconsideration denied, 4 NTSB 562 (1983), aff'd, Cassis v. Helms, Admr., FAA, et al, 737 F.2d 545 (6th Cir. 1984) (intentional falsification of application is a serious offense which in virtually all cases the Administrator imposes and the Board affirms revocation).

However, in contrast to respondent's assertions, we find no genuine issue of fact regarding respondent's knowledge.

We agree with the law judge that the evidence warrants a finding that respondent's answer has not created a reasonable doubt as to the truth of the Administrator's allegations. Block B.4. of the form states "Has flown at least 10 hours as pilot in command during the past 12 months in the following military aircraft." Respondent himself completed that block by inserting directly next to that sentence "CH-54A (SK-64)." Yet, the Administrator produced evidence to show that respondent had not flown the aircraft within 12 months (Attachment 12), and respondent has offered nothing to contradict that evidence.[11] Respondent could not have failed to see B.4., and could not have misunderstood it.

Other evidence is consistent with knowledge on his part. It is respondent who acknowledged that earlier in his career (in 1986, while at the Seattle office) he had tried to convert this same military flying and was told it would not be done. Respondent's testimony suggests an understanding at that time that doing so was prohibited or, at least, was problematic. Attachment 2 at 45-46. Respondent waited many years, and in 1993 found an examiner willing to issue the temporary certificate with no records of any kind from respondent to support the action. Id. at 49-50.[12]

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[11]Respondent states that he had flown CH-54As in Vietnam.

[12]In the meantime, respondent had translated many other

While not critical to the revocation order, as it is amply supported by the one intentional falsification finding, we also affirm summary judgment on the section 61.151(b) allegation. This allegation may be affirmed solely as a result of the § 61.59(a) finding. Cf. Administrator v. Cranford, 5 NTSB 343, 348 (1985).

ATP certificate holders are held to the highest standards of conduct, judgment, and responsibility and, as such, are the only ones required by the regulations to possess "good moral character." We think that an ASI who falsely vouches to the Administrator his entitlement to a rating for which he is not qualified can reasonably be said to lack this attribute.[13]

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(..continued)
military ratings he allegedly had to civilian ones. Respondent now acknowledges that all those ratings were not supported as the regulation and form require.

[13]Further, respondent must have known that he did not have the proper authority to administer a check ride to someone and immediately thereafter have that person administer a check ride to him in the same aircraft.